

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-208626.2

DATE: October 3, 1983

MATTER OF: W. H. Compton Shear Company

DIGEST:

1. GAO does not review a contracting agency's affirmative determination of responsibility absent a showing that the agency acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation have not been met.
2. Under the terms of the Walsh-Healey Act, 41 U.S.C. § 35-45 (1976), GAO does not consider the legal status of a firm as a regular dealer or manufacturer. This matter is to be determined by the contracting agency in the first instance, subject to review by the Small Business Administration (where a small business is involved) and the Secretary of Labor.
3. Where the awardee has offered, pursuant to the terms of the solicitation, items that qualify as domestic end products under the Buy American Act, 41 U.S.C. § 10a-d (1976), the awardee is obligated to supply such items. The fact that the awardee changes the source of one of its components in order to meet its obligation is immaterial.
4. Where, as here, the bid samples which the bidder submits for examination comply with the stated purpose for which they were required by the solicitation, there is no requirement that the samples otherwise comply with the specifications, nor is the bidder, by submission of noncompliant samples, relieved from furnishing items fully in accord with those specifications.

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5. The protester's contention that the awardee does not meet the solicitation requirement that bid samples be from the production of the manufacturer whose product is to be supplied is without merit. GAO finds that the protester's arguments overlook the fact the awardee is a manufacturer in that the awardee performs finishing operations on the items which are forged by another manufacturer and supplied to the awardee.
6. The determination concerning the reasonableness of prices submitted in response to a solicitation is a matter of administrative discretion which GAO will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. Although GAO questions agency's price comparison scheme (awardee's price was compared with a hypothetical domestic bidder who might have bid on a previous agency contract that was awarded to a foreign bidder), GAO cannot conclude that the agency's determination would have been different if the questionable price comparison scheme had not been used.

The W. H. Compton Shear Company (Compton) protests the award of a contract to American Scissors Corporation (ASC) under invitation for bids (IFB) No. FTP-AY-F0116-A-8-13-82 issued by the General Services Administration (GSA). The solicitation was a small business, labor surplus area set-aside for GSA's Fiscal Year 1983 requirements for 32 different types of scissors and shears.

For the reasons set forth below, we dismiss Compton's protest in part and deny it in part.

Background

Six firms submitted bids on all or some of the various types of scissors and shears specified in the solicitation. After four firms were eliminated by GSA as ineligible or nonresponsive, only ASC and Compton were further considered by GSA.

Subsequent to bid opening, ASC filed a protest with our Office alleging that a GSA amendment to the solicitation changing the production requirement for the contract items

from hot forging to cold forging did not allow firms adequate time to respond and indicated "favoritism" toward Compton, the only producer of cold forged scissors.

Compton then filed a protest with GSA alleging that ASC was not a qualified small business, labor surplus area concern. Compton also alleged that either a 6- or 50-percent evaluation factor, as set forth in the solicitation, had to be added to ASC's prices because, even though ASC offered to supply a domestic product in its bid, the company was actually not offering a domestic source end product within the meaning of the Buy American Act.

In response to ASC's protest, GSA advised that Compton had been rejected because the bid samples Compton had submitted had failed a certain test. As to Compton's objections to ASC's bid, GSA asserted that although ASC was eligible to participate in the procurement, ASC's prices for the various contract items were determined to be excessive and, thus, had to be rejected. GSA advised that cost and pricing data submitted by ASC after opening showed that a foreign product was being offered and GSA compared ASC's bid prices with last year's foreign awardee prices, as follows:

<u>"PREVIOUS CONTRACT</u>	<u>AMERICAN BID PRICE</u>	<u>PERCENT INCREASE</u>
Item 1 - \$972,371.04	\$1,503,783.12	54.7
Item 2 - 75,020.00	112,995.00	50.6
Item 4 - 401,863.00	616,302.50	53.4
Item 5 - 140,107.77	201,735.93	43.9

According to GSA, the applicable Producers Price Index for the relevant time period rose only 4 percent; ASC's prices are clearly excessive.

Following GSA's response to ASC's protest, ASC changed the source of its scissor forgings from foreign to domestic to comply with its bid. GSA then revised its price comparison methodology to reflect this. ASC's prices were compared to those on the previous GSA contract given to a foreign company with a 50-percent differential added on to the previous contract prices. Based on this comparison, GSA concluded that ASC's prices were reasonable and a contract was awarded to ASC.

Upon receiving the award, ASC withdrew its protest with our Office. At approximately the same time, GSA denied Compton's protest with the agency. Compton then filed the instant protest.

ASC's Eligibility

Compton contends that ASC cannot qualify as a small business concern which will perform the awarded contract in a labor surplus area. According to Compton, ASC has historically been an importer rather than a manufacturer of the type of scissors and shears covered by the IFB. Compton goes on to allege on the basis of information and belief that ASC has neither the equipment nor the personnel to perform any significant manufacturing operations at ASC's own facilities. From this, Compton concludes that there is a substantial likelihood that the scissors and shears required by the IFB will be manufactured in a nonlabor surplus area.

ASC's plant is located in a labor surplus area and ASC's bid obligates the firm to manufacture the scissors and shears under the contract at this plant. In essence, Compton's allegation involves matters pertaining to ASC's responsibility. Our Office does not review a contracting agency's affirmative determination of responsibility where, as here, there is no showing that the agency acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation have not been met. Jenkins Equipment Co., Inc., B-207512, June 2, 1982, 82-1 CPD 531.

Compton alleges that ASC does not qualify as a regular dealer or manufacturer under the terms of the Walsh-Healey Act, 41 U.S.C. § 35-45 (1976). Our Office does not consider the legal status of a firm as a regular dealer or manufacturer. By law, this matter is to be determined by the contracting agency in the first instance, subject to review by the Small Business Administration (where a small business is involved) and the Secretary of Labor. Gillette Industries, Inc., B-204232, August 13, 1981, 81-2 CPD 139.

Substitution of Forging Suppliers

Compton contends that GSA gave ASC an impermissible option to accept or reject award after bid opening when the agency allowed ASC to substitute a domestic forger for a foreign one.

GSA argues that ASC's changing forging suppliers had no effect on the responsive bid that ASC submitted. GSA points out that since ASC's bid indicated that the scissors and shears ASC was offering were domestic, ASC was "irrevocably obligated" by the terms of its bid to supply a domestic end product.

We agree with GSA. Where, as here, a bidder has offered under the terms of a solicitation items that qualify as a domestic end product under the Buy American Act (42 U.S.C. § 10a-d (1976)), the bidder is obligated to supply such items. See Propper Manufacturing Company, B-193230, February 16, 1979, 79-1 CPD 117. Moreover, we will not, as a general rule, investigate the bidder's intended method of compliance with its obligation to supply domestic end products since that is a matter of contract administration and, as such, has no impact on the validity of the award. Propper Manufacturing Company, *supra*. The fact that the company might have to change the source of one of its components in order to meet its obligation is immaterial. See also Arizona Industrial Machinery Company, B-191178, July 25, 1978, 78-2 CPD 68.

ASC's Bid Samples

Compton contends that ASC's bid samples should have been found nonresponsive by GSA. Compton alleges that GSA's evaluation reports show that ASC's bid sample for item No. 1 of the solicitation revealed noncompliance with Federal specifications on blade adjustments. Compton points out that the solicitation provided that bid samples would be evaluated for subjective characteristics which adversely affected "serviceability, durability and/or safety." In Compton's opinion, the above alleged noncompliance did not meet the IFB's listed subjective characteristics.

In addition, Compton claims that all of ASC's bid samples failed to comply with the solicitation requirement that bid samples be furnished "from the production of the manufacturer whose product is to be supplied." Compton argues that while ASC's bid samples utilized blades from the production of a foreign forging supplier, ASC's contract production will utilize blades from the production of the substituted domestic forging supplier.

GSA asserts that Compton's arguments regarding ASC's bid samples do not show that ASC's bid was nonresponsive. GSA states that the blade adjustment deficiency in ASC's bid

sample for item No. 1 did not affect the solicitation's subjective bid sample requirements of serviceability, durability, and safety.

Compton's argument that ASC's bid sample for item No. 1 did not comply with Federal specifications involves whether GSA properly evaluated ASC's bid sample for the solicitation's subjective characteristics of serviceability, durability and/or safety. See Lutz Superdyne, Inc., B-210161, May 17, 1983, 83-1 CPD 526. Generally, as long as the bid samples which the bidder submits for examination comply with the stated purpose for which they were required by the solicitation, there is no requirement that the samples otherwise comply with the specifications, nor is the bidder, by submission of such noncompliant samples, relieved from furnishing items fully in accord with those specifications. See D. N. Owens Company, 57 Comp. Gen. 231 (1978), 78-1 CPD 66.

GSA's sample evaluation reports show that the box "complies" was checked for ASC's bid sample on solicitation item No. 1. In the narrative portion of the evaluation on item No. 1, the reports state the following:

"Item complies with solicitation bid sample requirements. However compliance with the second sentence of paragraph 3.6.4 of GGG-S-00278 has not been achieved."

There is no indication in the record as to which of the several requirements in the second sentence of the specification ASC's bid sample did not comply with. However, the above-quoted portion of GSA's bid sample evaluation reports is quite clear that ASC's bid sample for item No. 1 of the solicitation complied with all of the solicitation's bid sample requirements. Therefore, we can only conclude that whatever the noncompliance of ASC's bid sample was, it did not involve the solicitation's subjective bid sample testing requirements of "serviceability, durability and/or safety."

As to Compton's contention that ASC's bid samples were not from the manufacturer that would be supplying the scissors and shears under the contract, Compton's arguments disregard the fact that ASC is also a manufacturer in that ASC performs the "finishing operations" of sharpening and adjusting the blades of the forged scissors and shears. The

record shows that several pieces of machinery are used by ASC in finishing the forged scissors and shears. Thus, we conclude that the operations necessary to make the unfinished scissors and shears forgings into the finished scissors and shears required by the Government may properly be regarded as manufacturing operations. See 48 Comp. Gen. 727 (1969).

Finally, we note that Compton alleges that the finishing operations which ASC is performing on the scissors and shears forgings are not the same finishing operations that were performed in the production of ASC's bid samples. According to Compton, ASC's bid samples were produced in August 1982, which was long before most of the finishing equipment necessary to perform the contract had been ordered by ASC. Compton goes on to assert that "it appears quite likely" the ASC's bid samples were handmade, one-of-a-kind items.

From the record, we find nothing to substantiate Compton's allegation that the bid samples furnished by ASC were not from ASC's own production. Indeed, the record shows that at the time Compton alleges that ASC had no equipment to produce finished scissors and shears, GSA had conducted a plant facility survey of ASC's manufacturing operation and had determined that ASC had the ability to produce the type of scissors and shears required by the solicitation. Further, in response to inquiries from GSA before award as to how the bid samples were made, ASC submitted an affidavit detailing the manufacturing process involved in their production. In our opinion, the affidavit clearly shows that ASC's bid samples were not handmade, one-of-a-kind items as alleged by Compton.

GSA's Price Reasonableness Determination

Compton asserts that GSA's price analysis and final conclusion that ASC's prices were not, as originally determined, "clearly excessive," were unreasonable, and that the solicitation should have been canceled. According to Compton, GSA's final price analysis proceeded from the illogical assumption that the Buy American Act 50-percent evaluation differential had to be employed to "inflate" the previous year GSA contract prices for foreign-made scissors and shears in order to make a comparison with ASC's actual offered price for its domestic-made scissors and shears. Compton emphasizes that while the Buy American Act and its implementing regulations prescribe a scheme for evaluating bids which affords a substantial advantage to domestic end

products by adding a "differential" to the bid of companies offering foreign end products, the statute's preference for domestic end products has no relevance to an agency's determination whether a particular domestic bid is reasonably priced. Compton further emphasizes that when ASC's prices were originally compared on an "absolute" basis by GSA with the previous foreign contract prices, ASC's prices were found to be 50.6 percent to 57.5 percent higher than the previous contract prices and similarly higher than domestic nonresponsive bidders under this solicitation such as Compton.

GSA notes that in making the determination of price reasonableness, Federal Procurement Regulations (FPR) § 1-3.807-2(b)(1) (1964 ed., amend. 194) permits the contracting officer to make "appropriate allowances" to compensate for any differences when comparing current price quotations with prior contract prices. Also, GSA asserts that the determination of price reasonableness should be made "in light of all prevailing circumstances." GSA argues that the circumstances that have to be considered here are that the foreign contractor's prices on the previous GSA contract for scissors and shears were "exceptionally low" and that a foreign supplier is entitled to receive an award only after application of a 50-percent differential to its bid. Therefore, GSA takes the position that, upon ASC's indication that the items it submitted prices on were domestic, the company's prices were then compared to the previous foreign contract prices plus a 50-percent differential which represented the amount GSA would have been willing to pay any domestic contractor who might have bid on the previous procurement.

The authority vested in the contracting officer to decide whether or not to cancel a solicitation is extremely broad. Fowler's Refrigeration and Appliance, Inc.--Reconsideration, B-201398.2, May 11, 1981, 81-1 CPD 368. FPR § 1-2.404-1(b)(5) (1964 ed., amend. 121) authorizes cancellation after bid opening where "all otherwise acceptable bids received are at unreasonable prices." We have stated that a determination concerning price reasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. Culligan Incorporated Cincinnati, Ohio--Reconsideration, B-189307, November 7, 1977, 77-2 CPD 345.

We agree with Compton that GSA's reliance on the 50-percent Buy American Act evaluation factor to increase previous contract prices was questionable for the purpose of determining whether ASC's prices were excessively high. In our view, GSA's position is based on the assumption that a hypothetical domestic bidder on the previous contract could have received the award because of the Buy American Act evaluation differential even though the domestic bidders' prices might have been 50 percent higher than the actual prices of the low foreign bidder. However, we find that if GSA had in fact received such prices in its previous procurement, GSA would still have had to determine, in accordance with regulation, that they were reasonable. Consequently, we cannot agree with GSA's assertion that it would have been willing to pay up to 50 percent more to any low domestic bidder who might have bid on its previous contract.

Instead, we find that what GSA could have done in making a price comparison was to have ascertained as best as possible what the reasonable domestic market prices for these nonunique scissors and shears actually were at the time. However, while we question the methodology used by GSA in comparing ASC's prices, particularly in view of the wide variance between ASC's prices of those of last year's foreign awardee and this year's nonresponsive domestic bidders, we are unable to find that the conclusion reached by GSA from its price comparison was unreasonable. The record reveals that the award prices for GSA's prior fiscal year scissor requirements were extremely low and, thus, for price comparison purposes, not representative of the market at that time. Apparently, the awardee under that procurement had an established history of radically dropping prices in order to obtain an award. Finally, we cannot say, and Compton has not argued, that GSA's determination would have been different if the questionable methodology had not been used.

Political Influence

Compton asserts that GSA's decision to award a contract to ASC was the product of significant congressional influence. According to Compton, GSA met with congressional representatives shortly after notifying our Office that ASC's bid prices were excessive and it intended to cancel the solicitation and assured them that it was "reconsidering" this decision. Compton also alleges that after "high-level" negotiations between GSA and the congressional representatives, the contract award to ASC was processed through

GSA with "extraordinary speed." Compton further alleges that GSA documents contain numerous references to the agency's desire for "expeditious" action and that the agency's normal preaward review procedures were unnecessarily circumvented in order for GSA to proceed with the award. Finally, Compton asserts that the award to ASC was expedited for the purpose of avoiding further legal action by Compton.

Compton's allegations of political influence involve the above-discussed substantive protest issues of GSA allowing ASC to change scissors forging suppliers after bid opening and GSA's revised price reasonableness determination, which we have considered and denied on the merits. The remainder of Compton's allegations involve, in our opinion, violations of GSA's internal award procedures. In this latter regard, GSA states that its Office of Inspector General has initiated an investigation into possible irregularities in the award of the contract. We expect that this investigation should resolve any questions concerning GSA's compliance with proper internal award procedures. In any event, since we found no agency impropriety on the substantive protest issues, GSA's alleged failure to follow normal award procedures does not affect the validity of the award made to ASC.

We dismiss Compton's protest in part and deny it in part.

for Milton F. Fowler
Comptroller General
of the United States